DATE: January 18, 1996

CASE NOS. 95-ERA-41

In the Matter of

WILLIAM DAVID SIMMONS

COMPLAINANT

v.

ARIZONA PUBLIC SERVICE CO./
ARIZONA NUCLEAR POWER PROJECT

Respondent

BEFORE: RUDOLF L. JANSEN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER
GRANTING SUMMARY JUDGMENT

On November 16, 1995, counsel for the respondent mailed a Motion for Summary Decision which was received by this office on November 20, 1995. Service of all documents other than complaints is deemed effective at the time of mailing. 29 C.F.R. § 18.4(c)(2). The complainant had ten days to respond to the motion (29 C.F.R. §18.6(b)) and an additional five days was provided since the motion was filed by mail. 29 C.F.R. § 18.4(c). Therefore, a response was due by the complainant on or before December 1, 1995. No response was filed by counsel for the complainant until December 8, 1995, which makes the complainant's response seven days late. No showing of good cause as to the reason for the late filing has been submitted. Following the filing of the complainant's response to the Motion for Summary Decision, the respondent, on December 13, 1995, mailed a reply.

The Motion for Summary Decision includes the affidavit of Jeanne Copsey who is employed by Arizona Public Service Company

(hereinafter APS) in the position of Human Resources Client Services Consultant. She has held that position since September, 1995 and before that time served as the Human Resources Represen-

tative for APS from September, 1990 to August 31, 1995. The motion also contains an attachment captioned Frontline Selection relating to a corporate re-engineering process; a job description for the position of Nuclear Auxiliary Operator IL/SR (Intermediate and Senior); a document captioned Workforce Management Guideline for Non-Management Employees (Attachment 3); a document captioned Palo Verde Redeployment Guidelines effective November 15, 1994 (Attachment 4); an APS business record reflecting evaluations for the position sought by the complainant during the re-engineering process (Attachment 5); a routine APS business record containing scores for each of the individuals who applied for the Nuclear Auxiliary Operator position in the fall of 1994 (Attachment 6); a handwritten note which the affiant prepared on November 17, 1994 which documents the verbal appeal request of the complainant (Attachment 7); and a copy of an electronic message from the complainant dated November 19, 1994 which confirms his appeal request. (Attachment 8) The motion also contains as a submission the confidential statement addressed to the complainant on January 13, 1995 which notified him of his successful appeal. (Attachment 9).

The affidavit of Ms. Copsey further indicates that she was responsible for developing and interpreting Human Resources Policies and Procedures, providing advice to management on Human Resource issues and developments and that she was actively involved in providing advice to management during the APS re-engineering which occurred throughout 1994 and 1995.

Ms. Copsey represents in her affidavit that she is over the age of eighteen, of sound mind and that she has personal knowledge of the facts stated in her affidavit. The affidavit relates the facts involved to be as follows:

> In 1993, APS planned a corporate re-engineering, which it implemented during 1994 and 1995. As part of the re-engineering process, APS formed various Selection Panels, consisting of three to five manager/supervisor employees, to evaluate the candidates' qualifications for the various positions. The makeup and responsibility of these Selection Panels is shown in Attachment 1, an APS business record, describing the process by which APS selected frontline employees.
>
> To assess each candidate's qualifications, the

[PAGE 3]
Selection Panels assigned numerical ratings for designated cultural and technical "competencies," *e.g.*, adaptability, technical knowledge, creativity, communication, problem solving, and drive/energy. Each area of competency had a designated weight. A candidate's score, therefore, consisted of the sum of each rating multiplied by the assigned weight of the area of competency.

Attachment 2 is the job description for an APS Nuclear Auxiliary Operator position and provides applicants with the position's competencies and respective weights. Attachment 2 is

also a routine APS business record.

After the Selection Panel performed the initial evaluation of the candidates, a Review Board reviewed the process and results to ensure compliance with company policies and the law. At the conclusion of the Review Board's work, the candidates with the highest scores received notice that they were selected. Similarly, the candidates with the lower scores also received notice of the results, as they existed at this stage of the process. The process, however, was not complete and the results for the non-selected candidates were not final. Attachment 3 is the APS Workforce Management Guideline for reducing non-management employees and is another routine APS business record.

APS afforded each non-selected employee the opportunity to have the initial decision reviewed by an APS Appeals Board. The Appeals Board consisted of three supervisory/management employees and had the authority to either approve or overturn the initial decision. The Appeals Board received additional support from an APS Human Resource representative and legal counsel.

While the Appeals Board reviewed an employee's initial evaluation, the employee was preliminarily deemed "surplus" or "over-complement." Nevertheless, that employee continued to work in his or her existing position and retained the same job title, position, and pay while the Appeals Board performed its review. In November 1994, APS instituted a policy that prevented the involuntary lay-off of employees whose appeals were ultimately turned down by the Appeals Board. The company's new Redeployment Guidelines, applicable to the Palo Verde Nuclear Generating Station ("PVNGS"), provided that over-complement employees would continue to work in their existing job classifications and departments until they received another position, or voluntarily elected to resign or accept a severance package. It did not

---

establish a maximum time limit after which an employee was subject to termination.

Attachment 4 is APS' PVNGS Redeployment Guidelines for finding over-complement employees alternate positions within the company. It is also a routine APS business record.

In October 1994, APS re-affirmed the existing job description, minimum requirements, and designated competencies for the job of Nuclear Auxiliary Operator (Intermediate and Senior) within the re-engineered organization. (See Attachment 2). Mr. Simmons was an incumbent Senior Nuclear Auxiliary Operator who expressed interest in retaining that position. Attachment 5 is an APS business record reflecting Mr. Simmons' evaluations for the positions that he sought during the re-engineer-

ing process. In accordance with the established re-engineering process, a Selection Panel evaluated Mr. Simmons' qualifications for the Senior Nuclear Auxiliary Operator position. The Selection Panel's evaluation resulted in Mr. Simmons receiving a composite score of 75. (See Attachment 5). The Review Board concurred with this evaluation on November 15, 1994.

In addition to Mr. Simmons, 131 other employees also applied for the Nuclear Auxiliary Operator position. APS selected 96 candidates for this position, and it selected 17 others for other positions in the company. One employee withdrew his name from consideration. Eighteen employees -- including Mr. Simmons -- were not initially selected. Only persons with scores above 83 received offers. The scores of those not selected ranged from 66 to 82. Attachment 6 is a routine APS business record, which contains a print-out of the scores for each of the individuals who applied for the Nuclear Auxiliary Operator position in the fall of 1994; however she removed the names of the candidates except for Mr. Simmons.

On November 17, 1994, Mr. Reginald Taylor, Mr. Simmons' supervisor, informed Mr. Simmons that the Selection Panel had not selected him for the position of Nuclear Auxiliary Operator. I was also present when Mr. Taylor informed Mr. Simmons. I explained to Mr. Simmons that under APS' re-engineering procedures, the Selection Panel's initial decision was not final and that he had the right to request that an APS Appeals Board review the initial decision.

Mr. Simmons verbally informed me on November 17, 1994, that he wished to continue the process by re-questing that an Appeals Board reconsider his evaluation. Attachment 7 is a handwritten note that I prepared on November 17, 1994, in which I documented Mr. Simmons' verbal appeal request. Two days later, on November 19, 1994, Mr. Simmons provided me with an electronic message confirming his appeal request. See Attachment 8.

Between November 17, 1994, and December 13, 1994, personnel from the PVNGS Human Resources Department and PVNGS management, who were familiar with the Nuclear Auxiliary Operator selection process and Mr. Simmons' performance, gathered additional information from Mr. Simmons and others to submit to the Appeals Board. On December 20, 1994, the Appeals Board reviewed Mr. Simmons' evaluation and determined that the Selection Panel had not reviewed some new performance information, which would have supported an elevated score and would have qualified Mr. Simmons for selection as a Senior Nuclear Auxiliary Operator. On or about December 20,

1994, Mr. Simmons received notice of this favorable action.

Under APS' existing re-engineering procedures, APS will place an employee who prevails before the Appeals Board in the next available opening of the job for which he or she had applied or a comparable job for which the person was qualified. APS, however, provided Mr. Simmons with an extraordinary remedy. It did not have Mr. Simmons wait for the next available Nuclear Auxiliary Operator vacancy. Nor did it assign him to a comparable position. Rather, APS created an additional Senior Nuclear Auxiliary Operator position specifically for Mr. Simmons. Attachment 9 is a memorandum in which APS confirmed Mr. Simmons' Senior Nuclear Auxiliary Operator assignment.

Throughout the entire re-engineering process, Mr. Simmons never ceased working as a Senior Nuclear Auxiliary Operator. His official duties, responsibilities, compensation, terms and conditions of employment, as well as his title, office, crew, working hours, and benefits never changed.

The response to the APS Motion for Summary Decision is a five and one-half page statement apparently authored by Michael G. Helms

---

[PAGE 6]
as counsel for the complainant. No affidavits or other documentary materials were submitted as responsive data. The statement contains a variety of representations concerning a longstanding and continuous effort by APS to retaliate against Mr. Simmons for engaging in protected activity. The response offers no dispute as to the basic facts alleged in Ms. Copsey's affidavit and, in fact, adopts portions of those facts as being true. No dispute is taken as to the dates of the applicable acts mentioned in the affidavit. The complainant does interject as a defense the legal theory of continuing violation as being a basis for the extension of the limitation period and suggests that his retention in one of the pools associated with the re-engineering process caused his complaint filing here to be timely. No affidavits or other documentary materials were submitted in support of that contention. Similarly, with the adverse employment action argument contained within the response of the complainant, only argument was made as to why the facts alleged would not support a summary judgment here. A vague reference is also made of the existence of "other issues" to be determined at the time of the hearing. Upon this basis, the complainant requests that the Motion for Summary Judgment be denied.

CONCLUSIONS OF LAW

A Motion for Summary Judgment in an Energy Reorganization

Act (hereinafter ERA) case is governed by the provisions of 18 C.F.R. §§ 18.40 and 18.41. *Trieber v. Tennessee Valley Authority*, Case No. 87-ERA-25, Sec. Dec. & Ord., September 9, 1993, Slip Op. at 7. A party opposing a Motion for Summary Judgment "must set forth specific facts showing that there is a genuine issue of fact for hearing." 19 C.F.R. § 18.40(c). The standard for granting a Motion for Summary Decision under 29 C.F.R. § 18.40 is the same as that for summary judgment under the analogous Fed. R. Civ. P. 56(e). The moving party must show that there is no material issue of fact and that he is entitled to prevail as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Eisner v. U.S. Environmental Protection Agency*, Case No. 90-SWD-2, Dec. & Ord. of Remand, December 8, 1992, Slip Op. at 4.

As was noted above, the response of the complainant to the Motion for Summary Decision was filed seven days late. Therefore, a genuine issue arises as to whether the statement of the complainant should be considered at all. However, due to it's content, that issue is rendered moot since the responsive statement does not serve to defeat the summary judgment motion. It was incumbent upon

---

[PAGE 7]
the complainant to submit specific facts demonstrating the existence of a genuine issue for trial. That has not been done in this case.

I am cognizant of the fact that it is necessary to deny a Motion for Summary Decision "whenever the moving party denies access to information by means of discovery to a party opposing the motion." 29 C.F.R. § 18.40(d). This case file gives no indication that the complainant has experienced any difficulty in obtaining responses to discovery requests. Therefore, that rule provision is inapplicable. The complainant cannot rest merely on the allegations or denials of his pleadings.

THE COMPLAINT IS TIME BARRED

The ERA provides an employee 180 days within which to file a complaint under Section 211. 42 U.S.C. § 5851(b)(1). The 180 day period commences on the date that the complainant received notice of the adverse action and not on the date that the complainant is effected by company adverse action. *Kang v. Department of Veterans Affairs Medical Center*, 92-ERA-31 (Sec. Dec. February 14, 1994); *Bonanno v. Northeast Nuclear Energy Co. et al*, 92-ERA-40 and 41 (Sec. Dec. August 25, 1993). It is undisputed that the complainant was placed in the over-complement pool on November 17, 1994. It was on that date that the complainant's supervisor advised him that the selection panel had not selected him for the position of Nuclear Auxiliary Operator. Although it was also explained to the complainant at the same time that the initial decision was not final and that he had the right to request a review, the record is clear that any adverse action that may have resulted from the action of APS

impacted at that time. Since the complaint of Mr. Simmons was filed on May 22, 1995, it was not submitted until 186 days after the time of the adverse action and is therefore, untimely under the statute. No argument is made that the doctrine of equitable tolling is applicable.

Accordingly, concerning allegations of Mr. Simmons as to discrimination relating to his placement in the over-complement pool, there is no genuine issue of material fact concerning his failure to satisfy the statutory requirement of filing his complaint within 180 days of the alleged violation. His complaint was filed six days late. Therefore, I recommend that the Motion for Summary Judgment of APS be granted. That finding is consistent with the conclusion of the Assistant District Director.

[PAGE 8]

COMPLAINANT HAS SUFFERED NO ADVERSE EMPLOYMENT ACTION

APS also contends that Summary Judgment must be entered against complainant because Mr. Simmons cannot establish a *prima facie* case since he suffered no adverse employment action. In his complaint of May 22, 1995, Mr. Simmons alleges that APS "retaliated against me and placed me in the employee over-complement pool to remove me from my position." He further suggests that the action was not justifiable and that it created an intolerable amount of mental stress and anguish for him.

The discriminatory allegations relate to the complainant's placement in the over-complement pool and the company's intention of removing him from his position. The complaint contains no factual allegations in support of the representations made and, in fact, Mr. Simmons also mentions in his complaint that in the latter part of 1995, he overturned the company decision to place him in the over-complement pool as a result of an internal appeal process. The basic facts are all consistent with the facts alleged in the affidavit of Ms. Copsey. The formal record of this case contains no other affidavits, discovery materials or personal representations made by the complainant concerning the alleged factual scenario resulting in the complaint filing.

To establish a *prima facie* case under the ERA, the complainant must establish that the respondent discriminated against him with respect to his compensation, terms, conditions or privileges of employment. 42 U.S.C. § 5851(a) (1988). It is necessary for the complainant to show that APS directed some form of adverse action against him. *Carroll v. Bechtel Power Corp.*, 91 ERA 46, Sec. Dec., February 15, 1995.

The factual representations contained within the Copsey affidavit stand essentially unrefuted. Under both 29 C.F.R. § 18.40 and Fed. R. Civ. P. 56(e), the party opposing a

Motion for Summary Judgment must set forth specific facts showing that there is a genuine issue for trial and the party may not rest upon mere allegations or denials of the pleadings. The representations made by Mr. Simmons in his complaint do not constitute an opposing affidavit since the suggestions of retaliation and discrimination are not based upon personal knowledge but rather on information and belief. *Schroeder v. McDonald*, 55 F.3d 454 (9th Cir. 1995); *Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc.*, 944 F.2d 1525 (9th Cir. 1991).

Mr. Simmons acknowledges in his complaint that the company action of placing him in the over-complement pool was overturned as a result of his appeal. Those factual representations are consistent with the facts stated in the Copsey affidavit. The facts demonstrate that the company designation of Simmons was

---

temporary. After having received notification on November 17, 1994 by the selection panel, Mr. Simmons remained in his existing position. During the appeal process, nothing changed from an employment standpoint. After it was determined by the Appeals Board that he should have been qualified as a Senior Nuclear Auxiliary Operator, APS created an additional Senior Nuclear Auxiliary Operator position specifically for the complainant. During the entire re-engineering process, his working condition did not change. Those facts are undisputed.

Counsel for complainant, in the Response to the Motion for Summary Judgment, makes generalized allegations that Simmons' placement in the over-complement pool changed his career path and was stressful. The responsive statement indicates that the company's failure to properly evaluate Mr. Simmons initially constituted harassment and discrimination. Informing him of the action and advising him of the need to qualify for another position also constituted adverse action. All of these representations constitute allegations or denials of fact, but the denials are unaccompanied by specific admissible facts tending to frame the issues in dispute.

Based upon this record, William D. Simmons has failed to demonstrate that he suffered any form of adverse employment action, and therefore, cannot establish a *prima facie* case of discrimination under the ERA. In considering the content of the Copsey affidavit and the complaint filed by Mr. Simmons, I find that there exists no genuine issue of fact for hearing relating to an adverse employment action suffered by complainant.

Therefore, it is my recommendation that the Motion for Summary Decision filed by APS be granted for this reason, in addition to the complaint filing having been untimely.

_____

Rudolf L. Jansen

Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Secretary of Labor to the Office of Administrative Appeals, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., NW, Washington, DC 20210. The Office of Administrative Appeals has the responsibility to advise and assist the Secretary in the preparation and issuance of final decisions in employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978. *See* 55 Fed. Reg. 13250 (1990)